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Supreme Court of the United States

October Term, 1968

No. 1969

GEORGE BRAVOS, JOSEPH LOMBARDI,
SAM MERCURIO, and WILLIAM MERCURIO,

Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For Writ of Certiorari to the
Appellate Court of Illinois, First District)

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. SCOTT
Attorney General
State of Illinois

JAMES R. THOMPSON,
JOEL M. FLAUM,
Assistants Attorney General,
160 North LaSalle Street,
Chicago, Illinois 60601,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1019

GEORGE BRAVOS, JOSEPH LOMBARDI,
SAM MERCURIO, and WILLIAM MESSINO,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Appellate Court of Illinois, First Judicial District was entered on September 9, 1969 and is reported at 252 N.E. 2d 776.

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the petition.

QUESTIONS PRESENTED

I.

Whether a jury may be returned for further deliberation after its foreman has spontaneously volunteered the present standing of the jury during its deliberations.

II.

Whether the right of a defendant to confront his accusers is denied when a co-defendant testifies and is impeached by the use of a prior inconsistent statement.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' RIGHTS TO A FAIR JURY TRIAL WERE NOT DENIED BECAUSE THE TRIAL COURT'S INQUIRIES TO THE JURY DID NOT COERCE THE VERDICTS OF GUILTY.

It is the contention of petitioners that the conduct of the trial court in questioning the deadlocked jury and then returning them for further deliberations coerced the verdicts of guilty in violation of petitioners' rights under the Fourteenth Amendment (Pet. 15-18).

The position of the People of the State of Illinois is that: (1) the conduct of the trial judge was scrupulously fair and did not coerce guilty verdicts; (2) the authority cited by petitioners is neither instructive nor in point; (3) there is ample precedent—both federal and state—which precisely sustains what the trial court did here; (4) no case has ever held what was done here to be error, constitutional or otherwise.

A.

What Happened During The Jury's Deliberations.

Petitioners' account of the jury's deliberations (Pet. 14) is too sketchy to support full consideration of the question presented and makes necessary a restatement of the facts.

The trial began on December 15, 1966 after selection of the jury (A. 26). It concluded on January 21, 1967 with the return of verdicts (A. 30). This time span included 17 days of trial testimony heard by the jury (Pet. 13-14). In its case in chief, the state called 15 witnesses, who underwent a total of 45 instances of direct, cross, redirect and

re-cross examination (A. 102-346). Five witnesses were called by the petitioners and they underwent a total of 19 instances of direct, cross, re-direct and re-cross examination (A. 354-449). In rebuttal, the state called three witnesses who underwent 8 instances of such examination (A. 449-468). After closing arguments, the court gave 34 instructions to the jury (A. 483-93) and submitted 36 verdict forms—18 not guilty, 18 guilty—involving the four petitioners and eight charges of kidnapping, six charges of aggravated battery, and four charges of conspiracy (Pet. 4, 17).

The case went to the jury on Friday, January 20, 1967. After several hours of deliberation the jury returned to the courtroom at 10:25 P.M. The judge asked whether a foreman had been selected and the foreman responded (A. 496). The following then occurred:

> "The Court: Do you feel, sir, that you are on the verge of completing your deliberations?
>
> The Jury Foreman: No, your honor, far from it." (A. 496)

The court then denied the request of the foreman for a "private audience" and said "Is there something you wish to say about your deliberations?"

> "The Jury Foreman: We seem to be hung up on several points. We have one or two people who—
>
> The Court: *Perhaps you can stop there.* May I ask this question. Have you arrived at your verdict? Are there any verdicts upon which you have agreed?
>
> The Jury Foreman: No, sir.
>
> The Court: I don't know in which order you are taking things. I am, perhaps, just suggesting that whatever that order is, it might be done in the other order and see if there are some verdicts upon which you can agree.

The Jury Foreman: We have tried them all. Many different ways. We are getting mostly the same type of answer.

The Court: It has been a long trial and there is much to go . . . ." (A. 496-97) (Emphasis added).

The jury then retired, and after further deliberations, returned to the courtroom. They asked if they could continue to deliberate. The trial judge said they could. After denying a request for a dictionary, the judge said, "Not asked but implied in all of this, provisions for staying overnight have been made. But let's continue as long as you wish your deliberations and I will be here. That's all" (A. 497).

The jury returned to the courtroom shortly after midnight. The judge asked if any verdicts had been reached. The foreman said that they had agreed upon no verdicts, and requested another hour of deliberation. The jury then retired and returned again to the courtroom at 2:00 A.M. The judge said that he had no intention of directing them, and was not directing them, whether to continue further deliberations or to stop for the night, but asked "would some rest assist you?" The jury then agreed to stop for the night and resume deliberations at 10:00 A.M. (A. 498-99).

After deliberating from 10:00 A.M. to 11:00 A.M. Saturday, January 21, 1967, the jury returned to the courtroom:

"The Court: Good morning, Mr. Foreman?

The Foreman: Your Honor, we are no further. We are completely deadlocked, eleven and one. We are no further than we were last night at midnight, no further along, and there's nothing we can do about it. The party just don't believe the case was proven. We sat and talked and that's it.

The Court: You may retire to the jury room" (A. 500).

After the jury returned to it's room, counsel for petitioners moved for a mistrial. The motion was denied. The judge then called the jury back:

> "The Court: As the Court indicated, the case that you have under deliberation is a case of some length, and somewhat complicated. The Court is going to give you further opportunity to consider the matter. I note it is approximately ten minutes after eleven. Before too long it will be time for the midday meal. The Court is going to give you further opportunity to deliberate" (A. 502).

After an interval the jury returned to the courtroom and the judge asked, "Are you making any progress and will further deliberations serve any useful purpose?" The foreman replied, "Yes, very much so" and the jury retired again to deliberate. When they returned to the courtroom the judge asked, "Are you making any progress and would further deliberations serve any useful purpose?" The foreman replied, "Yes, sir, we are getting along very good" (A. 503).

After lunch, the jury again deliberated and returned its verdicts at about 6:00 P.M. (A. 527). They convicted petitioner Bravos of two charges of kidnapping, two charges of aggravated battery and one charge of conspiracy. Petitioners Lombardi and Messino were convicted of the same offenses. Petitioner Mercurio was convicted of conspiracy but acquitted of the kidnapping charges (Pet. 4).

B.

Petitioners' Statement Of The Law.

Relying upon two decisions of this Court, three decisions of the Court of Appeals for the District of Columbia, one

decision of the Second Circuit and two decisions from California and Illinois, petitioners synthesize an argument which runs as follows: (1) This Court has held that it is reversible error for a trial judge to *ask* a deadlocked jury about its numerical division; (2) the courts of appeal have applied the same rule to cases where the trial judge sends the jury back for further deliberations after receiving *unsolicited* advice from the jury concerning its numerical division; (3) both California and Illinois cases have found no distinction between solicited and unsolicited information.

The rationale of these decisions, say petitioners, compels a rule that where a jury reports to the court that it is deadlocked and spontaneously indicates its numerical division, the trial judge is powerless to follow any other course than to declare a mistrial, for to send the jury back for further deliberations is coercive and thus violative of the Sixth and Fourteenth Amendments.

There is no such rule. There never has been such a rule in either the federal or state courts. To the contrary, what the trial judge did here has been upheld time and again as proper.

In *Burton* v. *United States,* 196 U.S. 283 (1904), the first case upon which petitioners rely, this Court reversed a *federal* conviction for failure to repeat the defendant's instructions to the deadlocked jury as a supplemental charge when the Court had previously given them during the main charge, but had denigrated them, in the jury's presence, as "abstract" and "general" propositions of law.

After so holding, the Court said, in *obiter dictum,* that the trial judge should not have asked the jury for its numerical division and then given the *Allen* charge.[1] The

1. Allen v. United States, 164 U.S. 492 (1896).

Court observed that "Cases may easily be *imagined* where a practice of this kind *might* lead to *improper* influences, and for this reason it ought not to obtain." (Emphasis added.)

The case did not turn upon this point; no cases were cited for such a proposition; no other or further rationale was given; the Sixth and Fourteenth Amendments were not even mentioned. Mr. Justice Harlan dissented from both the holding and the *obiter dictum*.

Thereafter, some controversy arose among the circuits as to the meaning and effect of the *Burton dictum* and the Court next returned to the issue in *Brasfield* v. *United States*, 272 U.S. 448 (1926).

In *Brasfield*, the trial judge *inquired of the jury* concerning its division (which was 9-3), and then, after giving an admonitory charge as to the necessity of reaching a verdict, returned the jury to its deliberations.[2] Brasfield was convicted and this Court reversed, saying:

> "Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances *which cannot properly be known* to the trial judge or to the appellate courts *and may vary widely in different situations*, but *in general* its tendency is coercive. It can rarely be resorted to without bringing to bear *in some degree*, serious *although not measurable*, an improper influence upon the jury. . . ."[3]

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2. For an account of the facts concerning this issue, see Brasfield v. United States, 8 F. 2d 472 (9th Cir. 1925).

3. 272 U.S. at 450 (Emphasis added)

No cases other than *Burton* were discussed in *Brasfield;* the Sixth and Fourteenth Amendments were not mentioned.

In the case next relied upon by petitioners, *United States* v. *Samuel Dunkel & Co.*, 173 F. 2d 506 (2d Cir. 1949), the Court of Appeals read *Burton* and *Brasfield* as compelling the reversal of a federal conviction where the judge inquired of the jury whether it was evenly divided or whether there was a preponderance on one side, received an answer that there was a heavy majority for one verdict and returned the jury after giving the *Allen* charge.[4]

In *Williams* v. *United States*, 338 F. 2d 530 (D.C. Cir. 1964), the Court of Appeals, relying upon *Dunkel*, reversed a federal conviction where, after *inquiring* of the numerical divsion, the trial court gave an *erroneous Allen* charge and returned the jury to its deliberations. Judge Miller dissented.

In *Mullins* v. *United States*, 356 F. 2d 368 (D.C. Cir. 1966), the court affirmed a federal conviction on the ground that no double jeopardy resulted when the judge, in a previous trial of less than two days duration, declared a mistrial and discharged the jury after the jury had reported, in a note that it was unable to agree and stood seven for conviction, four for acquittal and one undecided. This holding was also supported by defense counsel's failure to object to the mistrial at the time.

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4. In so holding the Court of Appeals distinguished a case where the court received an unsolicited indication of the jury's division. Bowen v. United States, 153 F. 2d 747 (8th Cir. 1946), *cert. den.*, 328 U.S. 835 (1946).

After so holding, Judge, now Chief Justice Burger, in *dictum,* observed that the jury's unsolicited revelation of its exact numerical division might also have been grounds for a mistrial because it would have been a "precarious undertaking" for the trial judge to have given *an additional charge*[5] and returned the jury to deliberate again.

Williams v. United States, 403 F. 2d 176 (D.C. Cir. 1968), upon which petitioners rely, does not involve the issue at all. There the court decided the question of whether the manner of polling the jury was coercive. The court's language which merely recited the *Brasfield* rule, was *obiter dictum.*

Finally, we are at a loss to understand petitioners' reliance upon *People* v. *Carter,* 69 Cal. Rptr. 297,[6] 442 P. 2d 353 (1968). For in *Carter,* the Supreme Court of California declared that it was *proper* for the trial judge to inquire of the jury concerning their numerical division.[7] And *People v. Duskewycz,* 189 N.E. 2d 299 (Ill. 1963), is equally inapposite. The Supreme Court of Illinois did not, contrary to petitioners' assertion, find that there was no distinction between an inquiry and a spontaneous revelation of the nature of the division. The issue was neither involved nor discussed.

This, in essence, is petitioners' authority. In no case cited by petitioners was a federal conviction, let alone a state conviction, reversed, either for constitutional or nonconstitutional reasons, where a trial judge returned a jury

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5. Presumably, the Allen charge.

6. Erroneously cited in the Petition as 60 Cal. Reptr.

7. See 442 P. 2d at 356.

to deliberate after the foreman spontaneously revealed the nature of the jury's division. Moreover, we believe, for the reasons which we shall later discuss, that the *Brasfield* rule was not only poorly reasoned, but, as a matter of policy and the proper administration of criminal justice, is unsound as well. It has been widely, and well-nigh unanimously, criticized.[8]

C.

Court Inquiry Concerning A Deadlocked Jury's Division Serves A Valid Purpose In The Orderly Administration Of Criminal Justice.

In the preceding section, we have demonstrated that the only rule which this Court, and the lower courts, have laid down is that in the federal system a trial judge may not inquire of a jury how they stand numerically, when the jury reports that they are deadlocked and cannot reach a verdict.[9] But neither this Court, nor any other upon which petitioners rely, have ever said that the rule is of constitutional dimension, or that it applies to a case where the jury's division was spontaneously revealed without inquiry by the trial court. Moreover, in all of the cases that have been reversed on this point, the revelation of the nature of the jury's division was followed by an additional charge, either of the *Allen* variety or one that was, to some degree, coercive, and the rationale of the cases which prohibit in-

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8. VIII WIGMORE, EVIDENCE §2350, pp. 680, 681, n.3 (3d ed. 1940); VIII WIGMORE, EVIDENCE, §2350, p. 693, n.3 (McNaughten ed. 1961); ORFIELD, FROM TRIAL TO APPEAL, p. 467 (1947); *Note* 41 HARV. L. REV. 797 (1928); *Note*, 27 COL. L. REV. 756 (1927); *Note* 76 U. PA. L. REV. 622 (1928).

quiry therefore, has always turned upon the supposed special coercive effect of such a charge on the minority of jurors who know that the judge knows before he gives the charge, that only a minority is hanging the jury. The fault of this procedure, it is said, is that the minority jurors may then believe that the judge disagrees with their position since he has given them a "dynamite" charge and returned them for further deliberations.

We believe that even this reasoning of *Brasfield*, and the cases which follow it, is wrong.

First, it is natural and to be expected, that when the question of guilt or innocence is submitted to twelve jurors for decision, there will be, at least at the beginning of the deliberations, a contrariety of views. That, after all, is the fundamental purpose of the jury system—to impose upon the prosecutor the task of persuading twelve persons of the defendant's guilt. But no one would seriously suggest that the Sixth Amendment requires that a jury reach a unanimous result upon the first ballot, else a mistrial must be declared. Early jury division offers the opportunity for each juror to explain the reasons for the rightness of his conclusions, and, in turn, to receive the views of the other side so that he may weigh them against his earlier opinion.

It follows, therefore, that jury disagreement, even stubborn and seemingly unresolvable division, is to be expected on occasion, especially where, as here, the trial was protracted, numerous witnesses are heard, the issues complex,

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9. The same rule has been applied where the judge does not ask for the numerical division, but inquires whether the jury is evenly divided or whether there is a preponderance on one side. See, *e.g.*, United States v. Samuel Dunkel & Co., 173 F. 2d 506 (2d Cir. 1949).

or the case turns solely upon an assessment of credibility by the finders of fact. In such cases the jury will remain in deliberation without reaching a verdict, until past the time when the trial judge and counsel believe that the issue should have been resolved. At this point, the trial judge is confronted with alternative courses of action.

He may simply call in the jury and, without more, declare a mistrial for failure to agree, discharge the jury and set the matter over for a new trial.

Obviously, this precipitous procedure is not only inappropriate, but may in fact, in the circumstances of a particular case, be arbitrary and wasteful as well. Counsel and the court might be mistaken in their opinion of the appropriate length of time needed to decide the case. The jury might have been on the verge of a verdict when returned to the courtroom and discharged. The clarification or repetition of a particular instruction might resolve the division if the minority jurors (or the majority jurors, for that matter) are under a misapprehension concerning the law. Since the case will have to be retried, the expenditure of both legal and material resources in the first trial will be wasted, and the impact of such retrials upon already clogged criminal dockets will be severe.

It is apparent, therefore, that summary discharge of the jury and a declaration of mistrial is not only unwarranted, but unwanted as well. The task faced by the trial judge at this point is, then, to take some action with regard to the "deadlocked" jury which might fairly resolve the impasse.

The only viable alternative is for the trial judge to determine whether the jury division is of such magnitude that a verdict cannot be reached even if additional time

for deliberation is allowed. Obviously, this determination cannot be made without inquiry of the jury in some form.

The form of the inquiry, however, is crucial. It will not do simply to inquire of individual talesman, or the jury as a whole, whether *they* believe further deliberation will produce a verdict. This necessarily compels the trial court to base his discretion solely upon the opinions of the jurors.[10] It is not surprising, therefore, that the great majority of courts in this country have rejected the federal rule and allowed inquiry into the jury's numerical division.[11] It may be crucial to a proper decision on (a) whether the jury should deliberate further, and (b) for how long; that the trial court know if the jury is split 6-6 on the one hand, or 11-1 on the other.

Even under the federal rule properly applied, however, the action of the trial court in this case would not have been error. For what was done here duplicates almost exactly the experience of the court in *Bowen* v. *United States,* 153 F. 2d 747 (8th Cir. 1946), *cert. denied,* 328 U.S. 835 (1946).

In *Bowen,* the deadlocked jury was called in and the foreman, *unsolicited,* informed the trial judge that the jury was split 11-1. The trial judge then gave an *Allen* charge and sent the jury back. The case involved three

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10. See, e.g., State v. Baker, 293 S.W. 2d 900 (Mo. 1956).

11. Among them Reed v. State, 335 P. 2d 932 (Okla. Crim. 1959); People v. Baumgartner, 332 P. 2d 366 (Cal. App. 1958); Finley v. State, 113 S.E. 2d 144 (Ga. App. 1960); State v. Anderson, 78 N.W. 2d 320 (Minn. 1956); Hooper v. State, 326 S.W. 2d 448 (Tenn. 1959); State v. Baker, 293 S.W. 2d 900 (Mo. 1956); Anderson v. United States, 262 F. 2d 764 (8th Cir. 1959); Beale v. United States, 263 F. 2d 215 (5th Cir. 1959).

defendants, 13 charges apiece, and 34 counts that were submitted to the jury after a two week trial. The jury deliberated 10 hours after receiving the case without reaching a verdict. Holding that the *Brasfield* rule did not govern a case where the revelation of the jury's division was not the result of the court's inquiry, the court of appeals affirmed.

In *Anderson* v. *United States,* 262 F. 2d 764 (8th Cir. 1959), the court of appeals followed *Bowen* in a case where the judge's inquiry revealed that the jury was "pretty evenly" split and the trial court thereafter gave an *Allen* charge. The rationale for this affirmance was that since the jury was evenly split there was no minority to coerce, either by the inquiry or by the additional charge.

In *Beale* v. *United States,* 263 F. 2d 215 (5th Cir. 1959), the court of appeals held that the *Brasfield* rule was "not inflexible" and affirmed a conviction where the trial court's inquiry disclosed that the jury's division was 9-3, the jury was sent back *without* an additional charge and returned a verdict after a short deliberation.

We agree with the rationale of *State* v. *Baker,* 293 S.W. 2d 900 (Mo. 1956). There the court inquired of the jury and learned that it was divided 10-2. The jury was then sent back to deliberate anew. The Supreme Court of Missouri said:

> "We have no doubt that it is common practice in this state, when the jury has deliberated for a considerable time, for the Judge to inquire how they stand numerically, without indicating what party or result they favor, for the purpose of ascertaining whether there is a reasonable probability of an agreement. Authorities differ as to the propriety of such an inquiry

> but we think *the real question is whether there was any coercion of the jury in connection with it.*"[12]

After discussing the *Brasfield* rule, and refusing to follow it, the court concluded:

> "However, our view is that such an inquiry is not *coercive per se* but that it must be determined *from the record* of what is said and done *at the time* whether or not there is any indication of coercion."[13]

In sum then, we have here a protracted trial, lengthy jury deliberations, a trial court's careful inquiry *without* requesting information of the numerical division, the foreman's spontaneous revelation, no additional charge given, and lengthy deliberations thereafter before guilty verdicts (as well as verdicts of acquittal) were reached. Since the record in this case does not even hint of coercion, petitioners' Sixth and Fourteenth Amendment rights to a fair trial by jury were not denied, even under the *Brasfield* rule, and *certiorari* should not be granted to consider this argument.

II.

THE USE OF A PRIOR STATEMENT TO IMPEACH PETITIONER LOMBARDI DID NOT VIOLATE THE REMAINING PETITIONERS' RIGHTS UNDER BRUTON V. UNITED STATES.

Petitioners' other claim of error which they believe merits review by this Court concerns the state's use, on rebuttal, of a converstation between agent Walker (the witness) and petitioner Lombardi (Pet. 12-13). The argument is

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12. 293 S.W. 2d at 905 (Emphasis Added).

13. 293 S.W. 2d at 906 (Emphasis Added).

that such testimony was, in the absence of a severance, forbidden by this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968) (Pet. 18-21).

In *Bruton*, this Court was confronted with a case where Evans and Bruton were jointly tried for the crime of armed postal robbery; a postal inspector testified to an oral confession by Evans which directly implicated Bruton, and Evans did not testify at the trial. This Court held that such a procedure violated Bruton's rights under the Confrontation Clause of the Sixth Amendment because the jury heard evidence of Evan's confession but Bruton was not able to cross-examine the accuser (Evans) since he did not testify. This result was reached, two Justices dissenting, though the jury was explicitly instructed that Evan's confession was to be considered only in determining his, and not Bruton's, guilt or innocence.

Bruton does not govern this case as the court below correctly held (Pet. App. 16-18). Here the evidence of a prior statement was admitted for the single purpose of showing that Lombardi, contrary to his testimony during the defense case in chief, had made a statement inconsistent with that testimony. It was not admitted as substantive evidence of Lombardi's guilt, let alone that of the other petitioners. It did not name them. As to petitioner Lombardi, the jury was scrupulously instructed that the statement was only admitted for impeachment purposes (A. 468). And, most importantly, Lombardi testified, was available for cross-examination, and, in fact, denied making such a statement.

It is clear that as the Illinois courts have held,[14] *Bruton* does not apply to cases where the confessing co-defendant

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14. People v. Somerville, 245 N.E. 2d 461, 465 (Ill. 1969).

takes the stand, testifies and is available for cross-examination by co-defendants. This Court was exact in its holding in that case:

> "Plainly, the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, *since Evans did not take the stand.* Petitioner *thus* was denied his constitutional right of confrontation."[15]

And:

> "The unreliability of such evidence is intolerably compounded when the alleged accomplice, *as here, does not testify and cannot be tested by cross-examination.* It was against *such* threats to a fair trial that the Confrontation Clause was directed."[16]

In this case the co-defendant did testify and was available for cross-examination. The out of court statement was offered only for the purpose of impeachment and the jury was so instructed. Since *Bruton* does not forbid this course, *certiorari* should not be granted to consider petitioners' argument.[17]

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15. 391 U.S. at 127-28 (Emphasis Added.).

16. 391 U.S. at 136 (Emphasis Added).

17. Other courts have so interpreted Bruton. See Rios-Ramirez v. United States, 403 F. 2d 1016 (9th Cir. 1968); Santoro v. United States, 402 F. 2d 920 (9th Cir. 1968); Lipscomb v. Maryland, 248 A. 2d 491 (Md. App. 1968); People v. Somerville, 245 N.E. 2d 461 (Ill. 1969).

CONCLUSION

The People of the State of Illinois request that the Petition For Writ of Certiorari be denied.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,

JAMES R. THOMPSON,
JOEL M. FLAUM,
Assistant Attorneys General,
188 West Randolph Street (Suite 2200),
Chicago, Illinois 60601, (312-793-2570),

Attorneys for Respondent.

EDWARD V. HANRAHAN,
State's Attorney,
County of Cook,
Room 500 — Civic Center,
Chicago, Illinois 60602,

MORTON E. FRIEDMAN,
Assistant Attorney General,

ELMER C. KISSANE,
Assistant State's Attorney,

Of Counsel.